78-1495

No. .....

In The

Supreme Court of the United States

October Term, 1978

WILMA RIGGS,

Petitioner,

v.

LAURENS DISTRICT 56, A BODY POLITIC AND CORPORATE; DR. CHARLES L. CUMMINS, JR., DISTRICT SUPERINTENDENT, AND THE FOLLOWING MEMBERS OF THE BOARD OF TRUSTEES: DR. W. FRED CHAPMAN, JR., CHAIRMAN OF THE BOARD; RICHARD SWETENBERG, RALSA FULLER, JOHN ADAIR, SAM BLACKMON, CALVIN COPPER, AND JOHN E. WILLINGHAM, ALL PERSONALLY, INDIVIDUALLY, JOINTLY AND SEVERALLY, AND THE SUCCESSORS IN THE OFFICE OF EACH.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Petitioner Wilma Riggs respectfully prays that a writ of certiorari issue to review the judgment of the South Carolina Supreme Court entered in this case on October 11, 1978.

OPINIONS BELOW

The opinion of the Laurens County Court of Common Pleas is unreported and is reprinted as Appendix A to this petition. The opinion of the South Carolina Supreme Court is reported at 248 S.E. 2d 306 (and at 18 BNA F.E.P. Cases 1221) and is reprinted as Appendix B to this petition.

JURISDICTION

The South Carolina Supreme Court's judgment issued on October 11, 1978. A timely petition for rehearing was denied on November 2, 1978 (App. C). On January 29, 1979, the Chief Justice extended the time for filing a petition for a

writ of certiorari to and including March 2, 1979 (App. D). On February 27, 1979, the Chief Justice further extended the time for filing a petition for a writ of certiorari to and including March 31, 1979 (App. E). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Does an employer who assigns employees covered by employment contracts to particular jobs on the basis of their race violate § 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981?

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1981, which originated as § 1 of the Civil Rights Act of 1866, provides:

> **§ 1981. Equal rights under the law**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Introduction

This action was commenced by Wilma Riggs, a former teacher in the respondent Laurens School District 56, who contended that because of her race she was required either to accept a transfer from the school in which she had been teaching for twelve years to another school where she did not wish to teach or else to resign her teaching position with the school district. Petitioner brought her claim under 42 U.S.C. § 1981.[1] Following a nonjury trial, the court found

[1] Petitioner also alleged a breach of contract. The trial court sustained this claim but the South Carolina Supreme Court reversed that ruling. The disposition of the contract claim is, of course, not subject to review in this Court.

that petitioner had, in fact, been discriminated against on the basis of race as she had alleged, and ruled that this discrimination violated § 1981. On appeal, the South Carolina Supreme Court reversed, holding that § 1981 does not reach discrimination in job assignments. Petitioner seeks review of this holding in this Court.

Statement of Facts

The facts, as found by the trial court and established by the largely undisputed evidence, are quite simple. Petitioner, a white woman, was employed as a teacher from 1962-74 by the respondent school district. Petitioner's yearly contract did not by its terms specify the school to which she would be assigned, but petitioner spent her entire twelve-year career teaching upper grade students at the Joanna Elementary School. Her performance, the trial court found, was "undisputedly satisfactory." App. 2a.

In February, 1974, respondent Cummins, the Superintendent of Schools, informed petitioner that she would not be reassigned to Joanna for the following school year. Cummins told petitioner that because of a projected enrollment decline, Joanna would be allocated one less teaching position in the fifth and sixth grades. Cummins further informed petitioner that she had been selected for transfer because among the fifth and sixth grade teachers who were white, petitioner had the least seniority. Petitioner was, however, senior to one of the black upper grade teachers.

At the time of the conversation, Cummins knew that a third grade teacher would be resigning from Joanna at the end of the then-current school year, creating a vacancy at that level. Petitioner was certified to teach third grade and, in the words of her principal "would have performed well" as a third grade teacher. But Cummins believed that regulations issued by the Department of Health, Education and Welfare and binding on those school districts which, like respondent, receive federal funds, required the district to increase the ratio of black to white teachers at Joanna.

Based on this understanding of the HEW regulations—an understanding which the trial court found, on the undisputed testimony of a high-ranking HEW official, was erroneous [2]—Cummins decided to use the occasion of a reduction in the number of fifth and sixth grade teachers as an opportunity to get rid of one white teacher, and the occasion of the resignation of the third grade teacher to add one black teacher. Pursuant to this scheme, petitioner, as the junior white upper grade teacher, was selected for transfer.

Cummins informed petitioner that her contract would be renewed only if she agreed to accept a transfer to the Bell Middle School. Petitioner was given an opportunity to think the matter over. She ultimately decided, and informed her principal who informed Cummins, that she could not accept the transfer because she felt that it was neither in her interest nor in the interest of the students she would be teaching for her to teach in the middle school.[3]

At Cummins' request, the principal prepared a letter of resignation for petitioner to sign. Petitioner declined to sign the letter as drafted, however, because it stated that

[2] As the court explained, Cummins was under the view that he was required to achieve a "two to one white to black ratio" at each school in the district because that had been the overall ratio of white to black teachers in 1968, when the district moved from a dual to a unitary school system. But as the court also explained, the undisputed testimony of the Chief of the Elementary and Secondary Education Branch of the Health, Education and Welfare Office of Civil Rights, Region 4, established that, in fact, the goal fixed by HEW regulations was only to *approximate* (within 10% or two teachers) in each school each year the ratio of white to black teachers that existed in the district as a whole for that year. In plaintiff's last year in the district, the faculty as a whole was 26.5% black, and the faculty at Joanna was 23.1% black (3 blacks and 10 whites). Thus, Joanna was under no obligation to increase the ratio of blacks on the faculty. Indeed, as the court found, three of the other schools in the district had a more racially imbalanced faculty than Joanna.

[3] Petitioner was at the time just two days shy of her sixty-second birthday. She felt that she was rather old to make the considerable

she did "not wish to be considered for employment in District 56" whereas in fact, because of what the trial court termed her " 'apparent love' for Joanna Elementary School," she very much wished to be retained at Joanna. The letter was accordingly modified to state that petitioner did not seek reemployment except at Joanna and petitioner signed the letter as modified. Petitioner was not offered a position at Joanna and consequently her employment ended with the close of the 1973-74 academic year.

Based on these facts, the trial court concluded that respondents had violated 42 U.S.C. § 1981. The Court reasoned that under *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), § 1981 "protects white persons as well as blacks from interference with their rights to make contracts on the basis of their race," App. 16a; that "race was a conscious consideration and factor in arriving at the decision to transfer Ms. Riggs," *id.*; and that respondents had "utterly failed" to establish "good reason for their decision," *id.* To remedy the violation the court ordered petitioner reinstated, with back pay from the date of termination to the date of reinstatement.

Respondents appealed to the South Carolina Supreme Court, which reversed. The Court's reasoning is contained in the following critical passage:

> The trial court . . . erred in holding that the school district violated § 1981. Even if race were a motivational factor in the Superintendent's decision to transfer Ms. Riggs, the fact remains that [she] was not *denied* employment because of her race. A viable employment alternative was offered to Ms. Riggs, but

adjustments that would be required in transferring from the small, rural elementary school in which she had spent her entire teaching career, to a larger, more urban middle school. In addition, because of a depth perception problem, petitioner was unable to drive an automobile and had a carpool to take her to Joanna; the transfer to Bell would have disrupted that arrangement and would, moreover, have required petitioner to travel an additional twenty miles each day to and from work.

for personal reasons she declined to accept. [App. at 20a-21a (Emphasis in original)]

Thus, the Court held that in the employment context, § 1981 prohibits a racially discriminatory refusal to hire but not a racially discriminatory transfer.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW DECIDES AN IMPORTANT AND UNRESOLVED QUESTION OF FEDERAL LAW IN A MANNER WHICH CONFLICTS WITH THE DECISIONS OF A NUMBER OF COURTS OF APPEALS.

This case presents a single question of statutory interpretation: does § 1981, which guarantees to all persons "the same right to make and enforce contracts . . . as is enjoyed by white citizens," secure only freedom from discriminatory refusals to contract, or does the law also secure freedom from discrimination in a contractually-based employment relationship.[4] This question goes to the very heart of

[4] This case does *not* raise any question as to the legality *vel non* of the reassignment of this particular petitioner, on the particular facts presented here, assuming § 1981 applies to such reassignments. The South Carolina Supreme Court based its decision sustaining the transfer solely on its conclusion that § 1981 did not apply to job assignments and transfers. If this Court were to grant a writ of certiorari and disagree with that interpretation of § 1981, the appropriate disposition would be for the Court to remand the case to the South Carolina Supreme Court to consider any other arguments respondents may have raised and preserved in defense of their action in transferring petitioner. Thus, for example, were respondents to contend that their discrimination, assuming it otherwise would transgress § 1981, was protected because taken in the erroneous belief that it was mandated by an affirmative action program (see p. 3-4 and n. 2, *supra*, and cf. *McDonald, supra*, 427 U.S. at 281, n. 8), that is a defense which—assuming *arguendo* it was properly preserved—should be considered in the first instance in the court below following remand; it was *not* the ground upon which the South Carolina Supreme Court decided this case, and petitioner does not ask this Court to decide that question without the benefit of a decision below.

the law's meaning and scope. As we proceed to show, it is a question on which this Court has not yet ruled, and on which those courts that have ruled are divided. Accordingly, the question warrants resolution by this Court.

In *Jones* v. *Alfred H. Mayer, Co.*, 392 U.S. 409 (1968), this Court held that 42 U.S.C. § 1982, which is derived from § 1 of the Civil Rights Act of 1866, prohibits purely private acts of discrimination in connection with the sale of real estate. In *Tillman* v. *Wheaton Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975), and *Runyon* v. *McCrary*, 427 U.S. 160 (1976), the Court held that 42 U.S.C. § 1981, which is also derived from § 1 of the 1866 Act, likewise prohibits private acts of discrimination in the area to which it applies, including the "mak[ing] and enforce[ment] of contracts." Specifically, in *Johnson, supra*, the Court held that § 1981 "affords a federal remedy against discrimination in private employment on the basis of race," 421 U.S. at 460, a remedy which is "separate, distinct, and independent," *id.* at 461, from the remedy against employment discrimination contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

As a consequence of the holdings in *Jones* and *Johnson*, § 1981 has become an important basis for employment discrimination litigation. As this Court recently observed, the Court has never definitely addressed the scope of § 1981. *New York City Transit Authority* v. *Beazer*, 47 L.W. 4291, 4295, n. 24 (March 21, 1979). But the lower federal courts have done so, and from their decisions a consistent interpretation has emerged. In granting all persons the right to "make and enforce contracts" free from racial discrimination, the lower federal courts have held, § 1981 must secure not only the right to enter into contracts on a nondiscriminatory basis but also the right to have a contractual, employment relationship which is free from racial discrimination. As the Sixth Circuit has stated, "Section 1981 is an equalizing provision, seeking to ensure that rights do not vary according to race." *Long* v. *Ford Motor Co.*,

496 F.2d 500, 505 (6th Cir. 1974). In short, § 1981 has been read as a general equal employment opportunities law which provides no "lesser protection against discriminatory practices" than Title VII. *Carrion* v. *Yeshiva University*, 535 F.2d 722, 729 (2d Cir. 1976).[5]

Consistent with this view, the lower federal courts have concluded that § 1981 provides a basis for challenging not just discriminatory refusals to hire, but also, e.g., discriminatory job assignments,[6] discriminatory enforcement of work rules,[7] discriminatory allocation of privileges such as vacation schedules,[8] discriminatorily-based evaluations of job performance,[9] and discriminatory failures to promote.[10] In none of these cases has any court asked whether the formal contract contained a discriminatory term; rather in each case it has been sufficient that the plaintiff was being discriminated against in the employment relationship.

The decision below, however, gives § 1981 a much narrower scope. The South Carolina Supreme Court has read § 1981's reference to an equal right to "make" a contract to refer only to the formal contract formation. On this reading, the court concluded that respondents had not violated § 1981 since they had offered petitioner the same formal contract—to be employed as a teacher—that they offered all of their hirees, even though, in making the offer, respondents announced their intention to deny petitioner, because of her race, the job assignment she wanted and would otherwise have received.

[5] In *New York City Transit Authority, supra,* this Court declared that "it seems clear that [§ 1981] affords no *greater* substantive protection than Title VII," 47 LW at 4295, n. 24 (emphasis added). It is indisputable, of course, that Title VII extends substantive protection against job transfers on the basis of race. § 703(a), 42 U.S.C. § 2000e-2(a).

[6] E.g., *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971); *Garner* v. *Giarrusso*, 571 F.2d 1330 (5th Cir. 1978).

[7] E.g., *Windsor* v. *Bethesda General Hospital*, 523 F.2d 891 (8th Cir. 1975).

[8] E.g., *Hackett* v. *McGuire Brothers, Inc.*, 445 F.2d 442 (3rd Cir. 1971); *Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973).

[9] E.g., *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Sherman* v. *Yakahi*, 549 F.2d 1287 (9th Cir. 1977).

[10] E.g., *Marlowe* v. *Fisher Body, supra,* n. 8.

The construction of § 1981 adopted below conflicts with the cases previously cited. The specific holding of the court below—that § 1981 does *not* prohibit an employer from exercising its job assignment powers under an employment contract in a discriminatory manner—cannot be squared with the three court of appeals decisions cited in note 6 *supra,* each of which held that § 1981 does prohibit discriminatory job assignments. More generally, by construing § 1981 not to reach any racially discriminatory employment practices engaged in by an employer with respect to employees covered by an employment contract, the court below rendered a decision which conflicts with the cases previously cited, nn. 7-10 *supra,* which have interpreted § 1981 to reach precisely such discrimination.

The question raised by the decision below is an open one in this Court. The cases in which this Court has found § 1981 [11] (or § 1982)[12] violations have all involved situations involving a discriminatory refusal to contract, analogous to a discriminatory refusal to hire. The Court has never squarely decided, however, whether those cases state the limit of § 1981's proscription. And in two employment cases, the Court has described the sweep of § 1981 in terms suggesting it to be much broader, i.e. that "§ 1981 affords a federal remedy against discrimination in private employment on the basis of race," *Johnson, supra,* 421 U.S at 459-460; *McDonald, supra,* 427 U.S. at 285. In *Johnson,* the challenge under § 1981 was "with respect to seniority rules and job assignments." 421 U.S. at 454. While the Court

[11] *Runyan* v. *McCrary, supra.*

[12] *Jones* v. *Alfred H. Mayer Co., supra; Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (1969); *Tillman* v. *Wheaton Haven Recreation Ass'n, supra.*

ruled that the complaint in that case was barred by the statute of limitations, the Court went on to state, albeit in dictum, that if the employer was in fact engaged in the discrimination that was alleged, "there necessarily will be claimants who are in a position now either to file a charge under Title VII or to sue under § 1981." *Id.* at 467 n. 13. Similarly, in *McDonald*, the Court, after holding that § 1981 protects whites as well as blacks, remanded for further proceedings a § 1981 claim alleging that the plaintiff had been discriminatorily discharged and further alleging that the union had discriminated in its representation of plaintiff.

The question of the scope of § 1981 is, necessarily, the threshhold question in every § 1981 case. The answer to that question is determinative of whether and when a discrimination complaint states a claim under § 1981. Given the importance of that statute, the fact that the question raised here goes to the core of the statute's meaning, and the frequent recurrence of the issue as evidenced by the cases cited earlier, the Court should grant a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to the South Carolina Supreme Court.

Respectfully submitted,

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Appendix A

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS
IN THE COURT OF COMMON PLEAS

WILMA RIGGS,

Plaintiff,

v.

LAURENS DISTRICT 56, A BODY POLITIC AND CORPORATE; DR. CHARLES L. CUMMINS, JR. DISTRICT SUPERINTENDENT, AND THE FOLLOWING MEMBERS OF THE BOARD OF TRUSTEES: DR. W. FRED CHAPMAN, JR., CHAIRMAN OF THE BOARD; RICHARD SWETENBURG, RALSA FULLER, JOHN ADAIR, SAM BLACKMON, CALVIN COOPER, AND JOHN E. WILLINGHAM, ALL PERSONALLY, INDIVIDUALLY, JOINTLY AND SEVERALLY, AND THE SUCCESSORS IN THE OFFICE OF EACH,

Defendants.

No. 75-CP-30-99

MEMORANDUM OPINION AND ORDER

This Bench matter was submitted to me in early May, 1977. Live testimony was conducted before the Court on February 10, and 11, 1977. Additionally, the record consists of a transcript of testimony taken at a School Board hearing before the defendant Board of Education in March, 1975, along with the deposition of the defendant Dr. Charles L. Cummins, Jr., and the deposition of an official from the Regional Office of the Department of Health, Education and Welfare in Atlanta, Mr. Lamar Clements. The record also includes assorted other materials and documents all of which have been admitted to evidence and considered by the Court. Counsel have also submitted to the Court substantial briefs in support of their respective positions and oral argument was conducted in early May, 1977. Based, therefore, upon the testimony, documents and arguments in this case, the following shall constitute my findings of fact, conclusions of law and order.[1]

[1] Because of both the length and detailed nature of this record,

FINDINGS OF FACT

The plaintiff, Ms. Wilma Riggs, who is white, was a school teacher at Joanna Elementary School in the Laurens District No. 56 public schools from the fall of 1962 up to and including the 1973-74 school year.

The Joanna Elementary School is one of six elementary and middle schools in Laurens District 56. Joanna has a rather small student population in the neighborhood of four hundred (400) students and a core of faculty of approximately twelve (12) homeroom teachers, which makes up the foundation of primary teaching faculty. For the school year 1973-74, the last one during which Ms. Riggs taught, there were thirteen (13) such faculty members. (See, *e.g.*, School Board Transcript, p. 20, lines 20-25.) The fifth and sixth grades at Joanna are grouped together in what is known as a "departmentalized" setting. This approach is like high school, in the sense that the individual teachers instruct students on the basis of subject matter areas rather than, as in the more traditional elementary setting, the same teacher instructing the same students in all the various subjects offered within the confines of the same classroom. The record indicates that, for the 1973-74 school year, there were five teachers assigned to the fifth and sixth grades departmentalized situation. Ms. Riggs taught math, and the four other teachers taught various other subjects including language arts, science, etc.

Ms. Riggs' performance while serving on the faculty at Joanna Elementary School was, all parties agree, undisputedly satisfactory. This conclusion is buttressed not only by the repeated renewal of her contracts each year for the span of more than a decade, but also by the testimony of her Principal, Mr. Frazier Sanders, her Superintendent, Dr. Charles L. Cummins, Jr., and her peers on the faculty. Further, as an indicia of Ms. Riggs' capabilities, she was select-

and the relative complexity of the issues herein, the Court find it necessary to review the facts and other circumstances leading to its conclusions in detail. The Court is not, in this sense, apologizing for the length of this order, but merely explains the reasons therefor.

ed to serve as Chairwoman of Joanna's Self-Study Committee in preparation for a visit and review by the Southern Association of Colleges and Schools to determine if the school would be accredited, which it ultimately was.

In February, 1974, the Superintendent of the District had a meeting with Ms. Riggs in the presence of her Principal, Mr. Frazier Sanders, whereat the Superintendent told Ms. Riggs that it would be necessary for her to transfer to a middle school (grades 6-8) in the District and to teach older students. The Superintendent had previously communicated, this Court finds, with the Principal about this transfer. (See, *e.g.*, School Board Transcript, p. 21, lines 5-10). There is some dispute in the testimony between the participants to that conversation as to whether the Superintendent was told by the Principal that he thought that Ms. Riggs would not accept such a transfer. Ms. Riggs, for several reasons, including the fact that she did not drive and already was situated in a car pool, the fact that she had a very satisfactory performance at her current school, knew the children and the community well, was approximately 60 years of age and viewed the transfer as very disruptive at that point in her career, decided that it was not in her best interest to transfer, and agreed to submit her resignation, based upon her conversation with the Superintendent. It is clear that but for this conversation, Ms. Riggs would have been awarded a contract for the 1974-75 school year to teach at Joanna Elementary School, and, presumably, for subsequent years, subject to her satisfactory performance.

Her apparent love for Joanna Elementary School, however, prompted Ms. Riggs to include in her resignation a statement that if a vacancy occurred at Joanna, she wanted to be considered for that vacancy. The Superintendent essentially concurs with this interpretation of this position of Ms. Riggs resignation in his deposition. The resignation in this form was submitted during the normal course of business through the Superintendent's office. He has testified that he was aware of this inclusion and accepted it without objection. (School Board Transcript, p. 105, lines 6-14; p.

106, lines 10-14; p. 110, lines 1-4).

Given the fact that but for this conversation, Ms. Riggs would have been employed for the 1974-75 school year at Joanna Elementary School, it is next necessary to turn to the criteria utilized by the Superintendent in reaching the determination that Ms. Riggs was the teacher on the faculty at Joanna Elementary School who was chosen and asked to transfer. Indeed, the Court views this as the very heart of this litigation.

The record is clear that Dr. Cummins arrived at this decision because:

1. He anticipated a loss of some number of students for the following school year at Joanna. Apparently, his estimates and the final enrollment figures for the school year are very close and, therefore, the Court accepts as fact that there would be a loss of approximately 12 students at the fifth and sixth grade levels within the school. The State Department of Education prescribes, essentially, a 1 to 26 teacher to student ratio. On this basis, apparently, the Superintendent concluded that it was necessary to reduce the number of departmentalized faculty members at the fifth and sixth grade levels from five to four. The Court finds as a matter of fact that there is sufficient evidence in the record to support Dr. Cummins' initial conclusions regarding the reduction of the faculty at the fifth and sixth grade levels.

2. Having, therefore, concluded that it was necessary to reduce a faculty member at the fifth and sixth grade levels, Dr. Cummins, then, according to the record in this case, focused in on the five teachers who were then teaching at the fifth and sixth grade levels at Joanna to determine which among them would be selected for the transfer. (See, *e.g.*, School Board Transcript at p. 22, lines 1-5). The Superintendent did not consider other teachers for transfer other than Ms. Riggs (see, *e.g.*, School Board Transcript, p. 22, lines 5-11), nor did the Superintendent, as seems to be the more appropriate procedure under various School Board policies, merely inform the Principal that it was necessary

to transfer a teacher and leave it up to the Principal who would be chosen. Once again, although there is a split in the testimony as regards whether the Superintendent asked the Principal before his conversation with Ms. Riggs whether the Principal thought Ms. Riggs would accept the transfer, it is clear on this record that the Superintendent never conducted his deliberations outside of the teachers at the fifth and sixth grade levels.

3. Having then established that it would be one of the teachers at that level, the Superintendent then applied two additional criteria. The first was, and this is the heart of this suit, that the individual should be a person of the white race (See, *e.g.*, Cummins depo., p. 47, lines 6-14). The basis for this conclusion so far as the Court can determine, appears to be a belief on the part of the Superintendent that his racial mix on the faculties at the respective schools within his District should be as close as possible to a two to one white to black ratio. (See, *e.g.*, Cummins depo., p. 34, line 16). The District offers, in support of this conclusion, communications flowing between the School District and the Department of Health, Education and Welfare in the late 1960s, corresponding with the time that the District was informed that it would be necessary to eliminate segregation "root and branch." (See, *e.g.*, letter Dodds to Wilder, former Superintendent, of 10/13/70). The School District also offers in support of their belief in this regard (that is that it was necessary for them to maintain a two to one white to black ratio on the faculties at each of their schools) certain other proceedings which had occurred between the Department of Health, Education and Welfare and Laurens District 56 regarding "erosion" of faculty members in the District overall. (See, *e.g.*, letter of 12/23/74 from Thomas to Cummins). The significance of this position is considered more fully *infra*.

The Superintendent, in any event, admits on at least three separate occasions that race was a factor. He said so at the time of the School Board hearing, he reiterated that in his deposition, and he stuck to this account in his testimony be-

fore the Court. The Court therefore finds based upon the Superintendent's statements that race was a factor in arriving at his decision as to whom to transfer from Joanna Elementary School. Furthermore, it is clear from the testimony that the Superintendent consciously chose to focus in on individuals for transfer based upon their race, a criteria agreed upon by the Board by way of their decision after the Board hearing.

4. The final criteria utilized by the Superintendent was one of seniority. (See, *e.g.*, Cummins depo., p. 47, lines 15-22; p. 48, lines 1-8). He once again confined his deliberations under this indicia to the members of the faculty at the fifth and sixth grade levels. The record also indicates that six members of the faculty at Joanna Elementary School had less seniority than Ms. Riggs, and it is also clear on the record that it would not be necessary, at the time in question, for a teacher who was certified in elementary education to take any additional credit in order to become certified for a teaching position at a middle school. (See, *e.g.*, Cummins depo., p. 49, lines 4-10). Therefore, it appears from the record that the Superintendent could have considered any of his faculty members at Joanna for the transfer to the middle school and would not, thereby, place any burden whatsoever upon any of his elementary school faculty members in terms of obtaining additional certification.

Further, the Superintendent confined his consideration to seniority based upon race. There were three white and two black faculty members at the fifth and sixth grade level. Ms. Riggs was least senior among the white faculty members, but more senior than one black faculty member at that level. It should be noted that all but one of the other teachers with less seniority at Joanna Elementary School than Ms. Riggs were white.

In summary, so far, the findings of this Court are that the Superintendent confined his deliberations to the fifth and sixth grade levels, that he used race as a criteria (based upon his assumption that this was necessary for purposes

of satisfying the requirements of the Department of Health, Education and Welfare) and finally that he used seniority as an additional criteria, confined also to the fifth and sixth grade levels, making no attempt to determine whether any other teacher in the school was willing to transfer, or alternatively, placing the final responsibility in the hands of the Principal which seems to be consistent with the standard operating provisions of the School District.

The record also indicates that Dr. Cummins knew, at the time of the conversation in February, that he was losing one of his white teachers anyway. (See, *e.g.*, School Board Transcript, p. 22, lines 23-26). Therefore, based upon his preliminary determination (with which this Court does not disagree) that it would be necessary to drop his faculty from thirteen to twelve members, this goal would have been accomplished by way of natural attrition and it was not necessary for the Superintendent to take any affirmative action in order to obtain that faculty number. If nothing had been done, the faculty ratio racially would have been nine whites to three blacks which, according to the testimony of the Department of Health, Education and Welfare, would have been satisfactory. (Clements depo., p. 55, lines 8-21).

The Superintendent also knew by mid- or latter April, 1974 (when contracts were due back from teachers) that he was also losing three other teachers who had decided not to return next year. (See *e.g.*, Cummins depo., p. 84, lines 14-18). One such departing teacher was Ms. Darlene Monts who also taught at the fifth and sixth grade levels, who was retiring, and her testimony before this Court indicated that her decision to retire was in part induced by the fact that Ms. Riggs was leaving and she would therefore be compelled to teach math. (See, also, School Board Transcript, p. 71, lines 1426). Two other teachers had also returned their contracts unsigned thereby indicating that they would not be back for the next school year. Of these three vacancies, the Superintendent hired one black teacher who was not able to fulfill the school year because of failure to satisfy State Department of Education minimal certification re-

quirements. This teacher and the other two hired had one-half year's teaching experience among them.

The testimony of the Principal indicates, in each regard, that he attempted to have Ms. Riggs considered for the vacancies in question, but was unsuccessful because, as he put it, he had certain guidelines from the Superintendent which prevented him from offering Ms. Riggs as a recommended teacher. (See, *e.g.*, School Board Transcript, p. 69, lines 6-15).

By memo dated May 3, 1975, the Principal once again recommended Ms. Riggs for employment (this time for the 1975-76 school year) and once again that was a rejected recommendation by the Superintendent and was never permitted to be considered by the Board. The Superintendent offers as reasons for his action the fact that, in the first instance, no written recommendations in compliance with the School Board's policies were supplied by the Principal. (See, *e.g.*, Cummins depo., p. 61, lines 13-14). However, it appears from the Principal's testimony, notwithstanding the fact that no written recommendation may have ever been supplied, that he was instructed not to supply any recommendations on Ms. Riggs. (See, *e.g.*, School Board Transcript, p. 69, lines 6-15). As regards the recommendations in May of 1975 that she be hired for the 1975-76 school year, the Superintendent stated in his live testimony before the Court that it was not on the proper form, although in writing. The Principal seems to suggest that the reason why Ms. Riggs was not rehired was because of the Superintendent's statement to the Principal that he would not hire a teacher who had refused to transfer. (See, *e.g.*, School Board Transcript, p. 67, lines 15-25).

The Principal's testimony was that Ms. Riggs was the best applicant among any of the teachers and would have been the individual he would have hired if he could have done so. (See, *e.g.*, School Board Transcript, p. 71, lines 21-24; p. 79, line 1, re: recommendations never been rejected). Moreover, at other points in his testimony (see, *e.g.*, Cummins depo., p. 89, lines 20-21), the Superintendent espouses the need to get the best possible qualified teachers and if this in fact were applied in the Riggs situation, there would be no doubt, based upon the Principal's recommendations, and her previous employment record, that Ms. Riggs would have been hired. It does not take an expert in education to conclude that the School District would have been far better off hiring someone with a substantial performance record not only generally but within the same School District, rather than taking their chances with new teachers having no previous experience and, therefore, who are not able to bring to the classroom the width and breadth and quality of experience provided by Ms. Riggs. Additional, Ms. Riggs called as an expert Dr. Marilyn Niedig from the University of South Carolina who testified that it would not have been in the best educational interest of the District to have hired the individuals that were ultimately hired rather than Ms. Riggs and that particularly with reference to the kinds of things that she did in the Self-Study Committee for the preparation of the Southern Association of Colleges she would bring to the classroom and to the faculty generally an additional dimension and capability not otherwise available by virtue of the teachers that were hired. A proven teacher in hand is, simply stated, a far greater asset than an unproven inexperienced teacher newly hired. Finally, it should be noted that Ms. Riggs did testify at the time of the School Board hearing that she would be willing to transfer in an emergency situation (School Board Transcript, p. 122, lines 12-14 but this indeed was not an emergency. The School Board had more than six months to plan for this transfer, given the fact that the conversation took place in mid-February and school would not open until late August. The School District, also presumably in response to this situation, has added to their contract, beginning with the 1975-76 school year, a provision which states that teachers will have to abide by the actions of the Superintendent and Board as regards transfers and virtually have no rights to confront such a decision.

Based, therefore, upon the totality of circumstances and the need to permit the ultimate triumph of form over substance in order to support the Superintendent's position on the reason why Ms. Riggs was not considered or renewed, it is the finding of this Court that the Superintendent's reluctance to rehire Ms. Riggs was because she submitted a resignation rather than accept the transfer.

In regards to the position taken by the Superintendent that it was necessary to transfer a white teacher and thereby obtain a 8 whites to 4 blacks ratio at Joanna, the testimony of Mr. Lamar Clements, Director of the Office of Civil Rights, Department of Health, Education and Welfare in Atlanta, is completely contradictory to Dr. Cummins' position on that subject. (Clements depo., pp. 15, 17, 20, 22, 26, 28, 31, 47, 55, 6061). Mr. Clements states in his testimony that, except for one instance in October and November of the 1970-71 school year, which occurred at the time of massive desegregation in the District when a multitude of transfers occurred, the District has had no problems as regards faculty racial composition in any of its schools or at Joanna. (Clements depo., pp. 36-38, 53). Mr. Clements clearly states in his testimony that the District was under no implied or direct imposition to transfer any teachers at Joanna Elementary School at any time since the fall of 1970, some four years prior to the incident in question. (Clements depo., pp. 60-61). Moreover, the record indicates that three of the schools in the District for the 1973-74 school year had a far more substantial problem with racial composition than did Joanna. (Exhibit 4B attached to Clements depo.). Even in view of this situation, the Superintendent testified before this Court that he had never made any attempts whatsoever to transfer any other teachers at Joanna or at any of the other schools experiencing similar or worse problems than those thought to be occurring at Joanna.

It is also the finding of this Court that the so-called "erosion" problem, discussed at length in the Clements depo. at pp. 38 to 53, line 8, which was ultimately dismissed against

the District (Clements depo., p. 53, lines 5-8), is unrelated to the matter at hand, the Pottinger memorandum of January 14, 1971, having set forth the proper standards for faculty composition requirements. This memo states, *inter alia:*

> School districts that have in the past had a dual school system are required by current law to assign staff so that the ratio of minority group to majority group teachers in each school is substantially the same as the ratio throughout the school district. (Pottinger memo of 1/14/70, p. 2).

The same rule was applicable at the time giving rise to the facts in this case. (Clements depo., p. 20, lines 23-28; p. 21, all; p. 22, lines 1-5).

CONCLUSIONS OF LAW

The plaintiff bases her case on four principal theories:

1. Interference with the right to take advantage of a protectible business or employment expectancy;

2. Breach of contract;

3. Discrimination arising principally from the Thirteenth Amendment and its statutory derivative, 42 U.S.C. § 1981, on the basis that plaintiff was denied the right to make a contract because of her race; and

4. Educational negligence against the Superintendent.

The first cause of action treated by the Court will be the one for breach of contract.

But for the Superintendent's conclusions as outlined, and his conversation with Ms. Riggs in mid-February, 1974, Ms. Riggs would have been awarded a contract for Joanna Elementary School for the 1974-75 school year, and presumably subject only to her satisfactory performance, would be employed at that same school now. The presumption of satisfactory performance is further supported by the fact that she had taught successfully at the same location for a dec-

ade, and the other indicia cited previously as regards her performance excellence.

The resignation was involuntary and, therefore, void from its inception. The resignation, induced by the conversation with the Superintendent in February, 1974, such conclusion and conversation based upon a mistake on the part of the Superintendent as regards the requirements of the Department of Health, Education and Welfare, makes the resignation involuntary:

> It may seem strange that common men are required to know the law when savants and jurists do not. The truth is that they cannot be, and are not, expected or required to know all the law upon which their rights depend. They are merely required to know enough law to avoid harming others by crime or tort or breach of contract. Corbin, *Contracts*, § 616, at p. 570 (3d Ed. 1971).

Accordingly, the defendants must be held responsible for their mistaken belief that the Department of Health, Education and Welfare would have required a reshuffling of the faculty racial ratio at Joanna Elementary School had it been 9 white and 3 blacks. The resignation so induced was of no effect and did not interrupt the employment relationship between the parties. *Montgomery* v. *White*, 320 F.Supp. 303 (E.D. Tex. 1969). Consequently, Ms. Riggs should have been given a contract on April 15, 1974, for the 1974-75 school year, even without need of a specific Principal's recommendation independent of the normal re-employment process.

The breach of contract may be committed by prevention, hindrance, or repudiation. Corbin, *Contracts, supra*, § 944, at p. 924.

Implicit in every contract is a duty imposed by law upon both parties to act in relation to each other in good faith. It is also the belief of this Court that the Superintendent, given his assignment as the chief administrative official of the District, has a high responsibility as regards knowing the requirements of such governmental agencies as the

Department of Health, Education and Welfare, and accordingly, particularly when it may interrupt an employment relationship, he must check into the requirements so imposed. In this instance, the record reflects (Clements depo., p. 13, lines 10-25; p. 14, lines 1-5) that even if the Department of Health, Education and Welfare had a reason to complain about the racial ratios at Joanna Elementary School for the 1974-75 school year, they would have made their views abundantly clear to the School District and given them ample opportunity to rectify any such deficiencies through conciliation.

The breach of the contract occurred in this case in two independent instances:

1. By way of the induced involuntary resignation as expressed above; and

2. By failing to rehire Ms. Riggs even after the initial breach by way of the induced resignation when vacancies did occur. The School District, by accepting Ms. Riggs' statement citing a desire to be considered for vacancies at the school, thereby assumed the obligation of offering to her employment with the School District for the following year, if the conditions precedent thereto occurred. In this instance, the obligation assumed by the School District, without objection, was to consider her, as is admitted by the Superintendent, for any subsequent arising vacancies, and failure to comply with this obligation constitutes further breaches. *Lorden* v. *Snell*, 39 Ariz. 128, 4 P.2d 392 (1931); *Anderson & Kay Drilling Co.* v. *Bacht*, 177 Okla. 394, 60 P. 2d 758 (1936). This is true particularly in a case where, as here, the testimony is clear that Ms. Riggs was the best qualified applicant and that but for the "guidelines" placed upon the Principal by the Superintendent, she would have been rehired. In a sense, the breach of contract preceded Ms. Riggs' decision to submit her resignation. It is a necessary implication of every contract with promises or covenants binding upon each party that neither will interfere to prevent performance by the other. 17 Am. Jur.2d, *Contracts*, § 442.

Accordingly, for the reasons above stated, it is the conclusion of this Court that the defendants have breached Ms. Riggs' employment contract for the 1974-75 school year and thereafter, insofar as she has not been re-employed since that period of time. The record, in this regard, reflects that Ms. Riggs has had an application for employment on file with the District since the incident in question and that one is still on file although no offers have been tendered. (Cummins depo., p. 117, line 24; p. 118, lines 1-2).

The defendants could offer no satisfactory reasons for either their obstinance in failing to rehire Ms. Riggs when ample opportunity was presented or for their transfer decision initially. Defendants cast their defense upon the proposition that this is merely a matter of teacher transfer, the rights to which are virtually unfettered by the School District. Apart from the fact that this ignores both the contents of Ms. Riggs' resignation statement, and the race factor, the rights to transfer are not totally unfettered. As the defendants clearly recognize and cite in their memorandum to the Court, the power to assign, reassign, or transfer must be exercised in good faith for the best interests of the School District, in accordance with the requirements of the law, and must be based on *actual existing school conditions*. 78 C.J.S., *School & School Districts*, § 198 (Emphasis supplied.) The defendants also assert that the right of transfer of a School District can only be disturbed if there is proof that the underlying reasons for such a transfer were improper or illegal.

First of all, the decision to transfer Ms. Riggs was not based upon actual existing school conditions, but rather upon the District's mistaken belief of those conditions or requirements. It was not, indeed, necessary to transfer Ms. Riggs or any other teacher for that matter from Joanna Elementary School given the fact that one other teacher was already leaving and the resulting racial composition of the faculty would have satisfied the Department of Health, Education and Welfare. In this sense, the decision to transfer becomes, consequently, arbitrary and capricious, a conclusion which is heightened by the fact that the record shows that other schools in the District had equal or worse faculty ratios based upon the formula subscribed to by the Superintendent, yet no corresponding effort on the School District's part to rectify such other existing problems were undertaken.

As regards the assertion that the transfer must be upheld, unless illegal, the question becomes whether race constituted such a condition. In the case of *Londerholm* v. *Unified School District*, 199 Kan. 312, 430 P.2d 188 (1967), the Supreme Court of Kansas held that a school board is not compelled to transfer a white teacher in the public school system, over his objection, because of his race, to a school other than the one to which he has been regularly assigned in order that the faculty may be better integrated. *Id.* at 202.

The School District also offers in defense the proposition that Ms. Riggs' transfer would have been, for the most part, lateral in nature and that she would have suffered virtually nothing by taking the transfer. Ms. Riggs' testimony, however, and that of Dr. Neidig, are to the contrary. Indeed, a teacher's assignment is very crucial to her happiness and, therefore, to the conditions which enable her to perform effectively. Ms. Riggs' considerations and factors in arriving at her decision were reviewed by Dr. Neidig, in her testimony, and were concluded to be substantial in nature. *Bernasconi* v. *Tempe Elementary School District No. 3*, 548 F.2d 857, (9th Cir. 1977). While the School District feels that they have a broad administrative right to engage in transfer, to which this Court generally does not disagree, they offer no corresponding reasons for failing to consider other teachers for transfer who had less seniority than Ms. Riggs noting that they would not impose thereby additional certification requirements on any such other transfer. Nor does the School District offer any satisfactory justification for failing to rehire Ms. Riggs once subsequent vacancies occurred for which she was qualified and for which the

Principal felt she was the best available to fill such vacancies.

Given the conclusion that race was a conscious, intentional factor, it becomes incumbent upon the defendants to show that this action was compelling in need and that no less drastic alternatives were available to them. In failing to show the requisite need under the applicable standards and by not considering other alternatives possibly available to them, the defendants have not succeeded in defending their actions. The facts, therefore, do not sufficiently match the tenets even subscribed to by the defendants. They cannot prevail, therefore, under their own standards of law.

Another cause of action against the School District is that they violated Ms. Riggs' right to make and enforce contracts because of her race.

42 U.S.C., § 1981, the codification of the Thirteenth Amendment to the Constitution of the United States, states:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws for the security of persons and property as is enjoyed by white persons and shall be subject to like punishment, pains, penalties, taxes, licenses, exactions of every kind, and to no other.

The United States Supreme Court has recently upheld that the provisions of 42 U.S.C. § 1981 apply to members of all races; that it protects white persons as well as black from interference with their right to make contracts on the basis of their race. *McDonald* v. *Sante Fe Trail Transportation Co.*, ... U.S. ...., 49 L.ed.2d 493, 96 Sup.Ct. 2574 (1976). The question then becomes whether race has been a consideration in violation of 1981.

The Court has already concluded, as a finding of fact, that the School District has admitted that race was a conscious consideration and factor in arriving at the decision to transfer Ms. Riggs. This, in the Court's view, creates a

prima facie case of discrimination thereby shifting the burden to the defendants to show by clear evidence good reason for their decision. The defendants, in this Court's view, have utterly failed to make any such showing.

In their brief, the defendants cite the same requirements relied upon by the plaintiff and characterize them as "controlling." The Court agrees, and according to the department of government obligated to enforce those rules, no action on the part of the School District was required, the defendants' views to the contrary notwithstanding. In any event, the enforcement agency's interpretation must prevail, absent a successful attack upon either their interpretation of the rules or the rules themselves, neither of which has been attempted, let alone successful. See, *United Jewish Organizations of Williamsburg, Inc.* v. *Carey*, ... U.S. ...., 45 U.S.L.W. 4221 (March 1, 1977). The defendants, by their reliance upon this memorandum, beyond question concede that they knew or should have known that their selection of race as an operative criteria, under the circumstances of this case, would violate the constitutional rights of one of their employees. See, *Wood* v. *Strickland*, 420 U.S. 308 (1975).

When dealing with a determination which, as in this case, adversely affects a teacher's employment, the District is under a substantial burden to justify its actions particularly when its criteria deal with race. The Court does not believe that, by reaching this decision, it is placing school districts between a proverbial rock and hard place. The record in this case is abundantly full of opportunities for the School District to have rehired Ms. Riggs and, in that sense, this decision rests upon their failure to do so. Insofar as a school district is entitled to transfer a teacher based upon existing circumstances which are lawful, it is only this Court's conclusion that this widely accepted proposition was not complied with in this instance. School superintendents occupy positions of trust to their faculties, their school boards, and their communities. Service as a school superintendent re-

quires high skill, and carries with it enormous responsibilities and prestige. Service as a school board member, although not without its onerous aspects, is likewise a fiduciary-type relationship to the various parts of a school community. These respective roles impose duties upon such school leaders to perform their obligations with keen eyes toward, *inter alia*, the rules and regulations of governmental entities which oversee and, to some extent, control their various acts. The responsibility is much like that placed upon school teachers to perform successfully in the classroom in accordance with the directions of their superiors. It is intolerable when a teacher who was performing as well as Ms. Riggs is mustered out of a system which is permitted, in that sense, to become its own worst enemy. Someone, in this instance the defendants, must supply a safeguard to prevent such occurrences. In this Court's view, the defendants in this case have fallen short of this obligation.

In view of the findings of fact and conclusions of law made by this Court, the Court feels that it is unnecessary to go into the other causes of action presented. As regards the interference with the right to an expected employment relationship is concerned, however, it might be noted that the Fifth Circuit has held that this claim is very similar to one falling under 42 U.S.C. § 1981. See, *Faraca* v. *Clemmons*, 506 F.2d 956 (5th Cir. 1975), *cert.* denied, 422 U.S. 1006 (1975).

ORDER

It Is, Therefore, the order of this Court that Ms. Riggs be reinstated as soon as possible within the District, that she be awarded back pay beginning with the school year 1974-75 and through to the present, along with "front pay" until such time as she is returned to the classroom. Additionally, Ms. Riggs shall be made whole in terms of her retirement benefits and such other benefits as she would have been entitled to had she remained on the payroll and as part of the faculty at Joanna Elementary School in Laurens

District 56. Plaintiff's requests for attorney's fees and punitive damages are denied.

It Is So Ordered.

/s/ James E. Moore
Judge, Eighth Judicial Circuit

Greenwood, South Carolina
August 11, 1977

Appendix B

THE STATE OF SOUTH CAROLINA

In the Supreme Court

WILMA RIGGS,
Respondent/Cross-Appellant,

v.

LAURENS DISTRICT 56, A BODY POLITIC AND CORPORATE; DR. CHARLES L. CUMMINS, JR., DISTRICT SUPERINTENDENT, AND THE FOLLOWING MEMBERS OF THE BOARD OF TRUSTEES: DR. W. FRED CHAPMAN, JR., CHAIRMAN OF THE BOARD; RICHARD SWETENBURG, RALSA FULLER, JOHN ADAIR, SAM BLACKMON, CALVIN COOPER, AND JOHN E. WILLINGHAM, ALL PERSONALLY, INDIVIDUALLY, JOINTLY AND SEVERALLY, AND THE SUCCESSORS IN THE OFFICE OF EACH,
Appellants/Cross-Respondents.

Appeal From Laurens County
James E. Moore, Judge

Opinion No. 20776

Filed October 11, 1978

REVERSED

James L. Edwards and John R. Ferguson, both of Clinton, for appellants/cross-respondents.

Craig K. Davis of Columbia, for respondent/cross-appellant.

NESS, A. J.: Respondent Riggs brought suit against the appellant school district after her employment was terminated at Joanna Elementary School. The trial court ordered Ms. Riggs reinstated with back pay. We reverse.

Ms. Riggs was a teacher at Joanna Elementary School in Laurens District 56 from the fall of 1962 through the 1973-74 school year. In February of 1974, the superintendent informed Ms. Riggs it would be necessary to transfer her to the Bell Middle School, within the district, due to decreased enrollment at Joanna. Respondent was selected for the transfer because she had less seniority among the white teachers at her level and it was thought advisable to transfer a white rather than a black in order to satisfy HEW requirements.

Ms. Riggs declined to accept the offer to transfer to the Middle School. Her decision was based on personal reasons, the primary one being that she liked her position at Joanna. It is clear the transfer would have precipitated no loss of benefits or decrease in salary.

Ms. Riggs tendered a statement declaring her intention to resign from the school district unless she could remain at Joanna. Re-employment was refused on those terms and her resignation was accepted.

The trial court concluded appellant induced Ms. Riggs to breach her contract and that 42 U.S.C. § 1981 was violated because of reverse discrimination against Ms. Riggs. We disagree.

Ms. Riggs had no vested contractual right to be employed at the Joanna Elementary School. The school district was not bound, contractually or otherwise, to grant respondent's personal wish to remain at Joanna. Appellant fulfilled any obligation it may have had to Ms. Riggs by offering her alternative employment within the district at no loss of salary or benefits.

The trial court also erred in holding that the school district violated 42 U.S.C. § 1981. Even if race were a motivational factor in the superintendent's decision to transfer Ms. Riggs, the fact remains that respondent was not *denied* employment because of her race. A viable employment alterna-

tive was offered to Ms. Riggs, but for personal reasons, she declined to accept.

We hold that respondent Riggs had no vested contractual right to be employed at the school of her choice. Accordingly, the order of the trial court is reversed.

Reversed.

LEWIS, C. J., LITTLEJOHN, RHODES AND GREGORY, JJ., concur.

Appendix C

Supreme Court of South Carolina

November 2, 1978

Craig K. Davis, Esquire
1518 Richland Street
Columbia, South Carolina 29201

Re: Wilma Riggs v. Laurens District 56, et al.

Dear Mr. Davis:

The Court has this day refused your petition for rehearing in the above case in the following order:

"Petition Denied.

s/ J. WOODROW LEWIS C.J.
s/ BRUCE LITTLEJOHN A.J.
s/ J. B. NESS A.J.
s/ WM. L. RHODES, JR. A.J.
s/ GEORGE T. GREGORY, JR. A.J."

The remittitur is being send down today.

Very truly yours,
/s/ FRANCES H. SMITH
CLERK

FHS/ch
CC: John R. Ferguson, Esquire
509 North Broad Street
Clinton, South Carolina 29325

James L. Edwards, Esquire
509 North Broad Street
Clinton, South Carolina 29325

Appendix D

Supreme Court of the United States

No. A-656

WILMA RIGGS,

Petitioner,

v.

LAURENS DISTRICT 56, ET. AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 2, 1979

/s/ WARREN E. BURGER
Chief Justice of the United States.

Dated this 29th
day of January, 1979

Appendix E

Supreme Court of the United States

No. A-656

WILMA RIGGS,

Petitioner,

v.

LAURENS DISTRICT 56, ET AL.

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including March 31, 1979

/s/ WARREN E. BURGER
Chief Justice of the United States.

Dated this 27th
day of February, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1495

WILMA RIGGS, PETITIONER,

versus

LAURENS DISTRICT 56, A BODY POLITIC AND CORPORATE; DR. CHARLES L. CUMMINS, JR., DISTRICT SUPERINTENDENT, AND THE FOLLOWING MEMBERS OF THE BOARD OF TRUSTEES: DR. W. FRED CHAPMAN, JR., CHAIRMAN OF THE BOARD; RICHARD SWETENBERG, RALSA FULLER, JOHN ADAIR, SAM BLACKMON, CALVIN COPPER, AND JOHN E. WILLINGHAM, ALL PERSONALLY, INDIVIDUALLY, JOINTLY AND SEVERALLY, AND THE SUCCESSORS IN THE OFFICE OF EACH, RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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Newberry, South Carolina 29108,
Attorneys for Respondents.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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IN THE

Supreme Court of the United States

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

The respondents respectfully pray that this Court deny a writ of certiorari to review the judgment of the South Carolina Supreme Court entered in this case on October 11, 1978.

QUESTION PRESENTED

Is 42 U. S. C. § 1981 violated when a school district transfers a white teacher to another school, in order to satisfy H. E. W. requirements as to proper white-black faculty ratios, where the teacher suffers no loss of money, benefits or rights?

STATEMENT OF THE CASE

The petitioner, a white female teacher, alleges discrimination based upon race because of her transfer to another school within Laurens School District 56. It was found by the trial court that she was transferred by her Superintendent because (a) enrollment was declining at her former school, (b) the Superintendent believed that the teacher transferred should be white so as to achieve the proper black-white teacher ratio in accordance with regulations of the Department of Health, Education and Welfare, and (c) the petitioner was least senior among the white teachers at her former school and therefore the proper one to be transferred (Petition for Writ of Certiorari, App. pp. 4a-6a).

Petitioner declined, for personal reasons, to accept the transfer to another school eight (8) miles away from her school in Joanna, and voluntarily submitted her resignation (Petition for Certiorari, App. at p. 3a).

The trial court ruled in favor of the petitioner based upon 42 U. S. C. § 1981, but the South Carolina Supreme Court reversed the finding of liability under this section. The court ruled that the petitioner was not discriminated against, and that she had no contractual right to be employed at the school of her choice (Petition for Certiorari, App. at p. 22a).

REASONS FOR DENYING THE WRIT

The decision below was properly decided on the facts and involves no important or unresolved question of Federal law.

The petitioner asserts that, because 42 U. S. C. § 1981 secures to all persons "the same right to make and enforce contracts . . . as is enjoyed by white citizens," she has a right to remain as a teacher in the school of her choice for as long as she chooses. In denying her relief, the Supreme

Court of South Carolina ruled completely in accordance with previous rulings of this Court.

Rule 19 of the Rules of this Court provides that a review on writ of certiorari from a state court ruling will be granted

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Neither circumstance exists in the instant action. The petitioner has failed to present any important or unresolved question of federal law.

The petitioner cites no case in which it has been held that a transfer of a teacher without any loss of money, benefits or rights constitutes a violation of 42 U. S. C. § 1981. Race was but one factor in petitioner's transfer in the instant case (Petition for Certiorari, App. at pp. 4a-6a). Her transfer was ordered by the respondent Superintendent based upon his desire to comply voluntarily with H. E. W. regulations regarding black-white teacher ratios. (Petition for Certiorari, App. pp. 6a-7a).

Every opinion of this Court which is cited by the petitioner involves racial discriminations in which there were deprivations of substantial rights, such as termination of employment, *McDonald v. Sante Fe Trail Transportation Company,* 427 U. S. 273 (1976), denial of admission to school, *Runyon v. McCrary,* 427 U. S. 160 (1976), refusal to sell to blacks, *Jones v. Alfred H. Mayer Company,* 392 U. S. 409 (1968), denial of seniority status and higher paying job assignments to blacks, *Johnson v. Railway Express Agency,* 421 U. S. 454 (1975), and denial of membership to blacks in a community swimming pool association, *Tillman v. Wheaton-Haven Recreation Association,* 410 U. S. 431 (1973).

The petitioner has cited three (3) opinions from the United States Court of Appeals for the Fifth Circuit allegedly in support of her contention that § 1981 provides a basis for challenging discriminatory work assignments.[1] In each of the three, the plaintiff had been actually damaged and there was clear intent to discriminate. In *Garner*, a black policeman was transferred because of race to a dangerous patrol area under unusual discriminatory circumstances. In *Boudreaux*, the plaintiffs were black longshoremen who were losing certain jobs and receiving undesirable jobs because of their race. In *Guerra*, the plaintiff alien was transferred to a less desirable and lower paying job because of his nationality.

The threshold requirement for petitioner is that she prove that she has a protected property or contractual interest in a particular job assignment. The Supreme Court of South Carolina held that the petitioner had no such property interest in continued employment on her own terms and, therefore, no basis on which to assert a § 1981 claim. This is entirely consistent with this Court's ruling in *Board of Regents of State Colleges v. Roth*, 408 U. S. 564 (1972), in which it was held:

> "To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

The petitioner's "hope" that she could remain at the Joanna school fails to satisfy this requirement.

As the Court also stated in *Adler v. Board of Education of City of New York*, 342 U. S. 485, 492 (1952):

> "It is equally clear that [persons employed or seeking employment in the public schools] have no right to work for the State in the school system on their own terms. (Citation omitted). They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to . . . go elsewhere."

[1] *Guerra v. Manchester Terminal Corp.*, 498 F. 2d 641 (5th Cir. 1974); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F. 2d 1011 (5th Cir. 1971); *Garner v. Giarrusso*, 571 F. 2d 1330 (5th Cir. 1978).

The South Carolina Supreme Court was correct in ruling that

> "Ms. Riggs had no vested contractual right to be employed at the Joanna Elementary School. The school district was not bound, contractually or otherwise, to grant respondent's personal wish to remain at Joanna. Appellant fulfilled any obligation it may have had to Ms. Riggs by offering her alternative employment within the district at no loss of salary or benefits." (Petition for Writ of Certiorari, App. page 21a).

This Court ruled in *Johnson v. Railway Express Agency*, 421 U. S. 454 (1975), that 42 U. S. C. § 1981 "relates primarily to racial discrimination in the making and enforcement of contracts." *Id.* at p. 459. The decision of the state Supreme Court in the instant matter is certainly in line with the holding in *Johnson*.

If this Court were to grant the petitioner's Writ and adopt her far-fetched position, it would lead to the paralysis of voluntary, good faith integration in the schools. It would also eventually lead to the paralysis of any court-ordered teacher assignments in which race was a factor.

Laurens County School District 56 formerly operated under laws establishing segregation as a legal requirement. The District was therefore under an affirmative obligation to take measures to effect faculty desegregation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971); *Green v. County School Board*, 391 U. S. 430 (1968); *Keyes v. School District No. 1*, 413 U. S. 189 (1973). The respondent Superintendent in the instant case at-

tempted to faithfully discharge his duties and achieve the proper racial ratio among the teachers in his district. These respondents certainly should not be penalized for their efforts.

As stated by Justice Rehnquist in *Dayton Board of Education v. Brinkman,* 433 U. S. 406 (1977), local autonomy of school districts is a vital national concern. *Milliken v. Bradley,* 418 U. S. 717, 741-742 (1974), *San Antonio Independent School District v. Rodriguez,* 411 U. S. 1 (1973), and *Wright v. Council of City of Emporia,* 407 U. S. 451, 469 (1972).

Further, this Court's decision in *University of California Regents v. Bakke,* .... U. S. ...., 96 S. Ct. 2733 (1978), has reinforced affirmative action plans. Although there is no true majority decision in the case, the various opinions filed agree that race can be a factor in the school admission context. As stated by Justice Blackmun:

> "It is gratifying to know that the Court at least finds it constitutional for an academic institution to take race and ethnic background into consideration as one factor, among many, in the administration of its admissions program." *Id.* at p. 57, L. Ed. 2d 844.

Justice Blackmun's comment acknowledges this Court's acceptance of "affirmative action" plans, so long as they are not rigid "quota" plans.[2]

In the instant case the respondents were only implementing a voluntary plan which would give Laurens School District 56 the proper racial balance at the various school faculties. This is not unusual for school administrators. Indeed, under the so-called Singleton Plan set forth in *Singleton v. Jackson Municipal Separate School District,*

[2] The Court in *Bakke,* through the various opinions, seems to favor the so-called "Harvard Plan" of considering race as one factor in a college admissions policy rather than the quota plan of the University of California at Davis under which 16 places in the medical school class were set aside for minority students.

419 F. 2d 1211 (5th Cir. 1970), the United States Court of Appeals for the Fifth Circuit ordered the racially-mixed assignment of teachers and staff in 15 school districts in six states. If the school administrators in the instant case did not have the power to consider race in this context then integration of faculties in the schools would be impossible to achieve. To adopt the petitioner's position in this case would mark the end of voluntary integration efforts by school officials.

The Supreme Court of South Carolina has correctly decided this case. Its ruling conflicts with no previous ruling of this Court. For this Court to consider the petitioner's case on the merits would trivialize 42 U. S. C. § 1981 and enable teachers throughout this country to dictate the terms of their employment.

CONCLUSION

For the reasons stated herein, the Court should deny a Writ of Certiorari to the South Carolina Supreme Court.

Respectfully submitted,

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April 19, 1979.

No. 78-1495

In The

Supreme Court of the United States

October Term, 1978

WILMA RIGGS,

Petitioner,

v.

LAURENS DISTRICT 56, A BODY POLITIC AND CORPORATE; DR. CHARLES L. CUMMINS, JR., DISTRICT SUPERINTENDENT, AND THE FOLLOWING MEMBERS OF THE BOARD OF TRUSTEES: DR. W. FRED CHAPMAN, JR., CHAIRMAN OF THE BOARD; RICHARD SWETENBURG, RALSA FULLER, JOHN ADAIR, SAM BLACKMON, CALVIN COOPER, AND JOHN E. WILLINGHAM, ALL PERSONALLY, INDIVIDUALLY, JOINTLY AND SEVERALLY, AND THE SUCCESSORS IN THE OFFICE OF EACH,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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As we explained in our Petition for a Writ of Certiorari, this case raises a question that goes to the heart of the meaning and scope of 42 U.S.C. § 1981: does that law secure only freedom from discriminatory refusals to contract, or does it also secure freedom from discrimination in a contractually-based relationship—here an employment relationship. Respondents suggest that the question is neither important nor unresolved. But nothing in respondents' Brief in Opposition supports respondents' assertion that the question raised here as to the reach of § 1981 is unimportant. And respondents' attempt to argue that the question presented is a settled one depends entirely on cases which have nothing to do with the construction of

§ 1981.[1] Thus, respondents' discussion of the issue raised in our petition does not diminish from our showing that the petition should be granted.

In addition to discussing the question that is presented by the petition respondents also address at some length the merits of a question that is *not* presented: whether § 1981 permits race conscious teacher assignments as part of a voluntary affirmative action or desegregation plan. In our Petition at 6 n. 4 we showed that the South Carolina Supreme Court (whose decision is reprinted at 20a-22a of our Petition) did not reach any such issue; the only federal question it decided—and thus the only federal question raised by this case and posed by our petition for a writ of certiorari—is the one previously stated concerning the reach of § 1981. Moreover, on its facts, this case could not raise any question concerning the lawfulness, under § 1981, of a public employer adopting an affirmative action or desegregation plan, whether done voluntarily or under compulsion by the Federal Government. The findings of the trial court establish that the transfer of petitioner from one school to another, was *not* made pursuant to an affirmative action plan.[2] Thus, the only issue properly presented by this case is the issue raised in our petition for a writ of certiorari. That issue is worthy of this Court's attention. Accordingly, a writ of certiorari should issue to review the judgment and decision of the South Carolina Supreme Court.

Respectfully submitted,

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[1] Respondents assert (at 4), without any supporting logic or precedent, that the threshhold requirement for a § 1981 claim is proof that the claimant "has a protected property or contractual interest"; based on this assertion, respondents proceed to argue that *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Adler* v. *Board of Education*, 342 U.S. 485 (1952), establish that petitioner here had no such interest. Respondents' argument fails at its premise. If one thing is settled about the reach of § 1981, it is that the law does *not* protect only those who have a "protected property or contractual interest"; indeed a racially discriminatory refusal to enter into a contract—whether an employment contract or other contract—is a core violation of § 1981. *Runyon* v. *McCrary*, 427 U.S. 160 (1976). The question presented here is whether § 1981 protects against discrimination not only in the formation of contracts but also in a contractually-based relationship. On that issue—which is an open one in this Court—*Roth* and *Adler* are beside the point.

[2] The trial court found that the transfer of petitioner was an ad hoc decision by the Superintendent based on his "mistaken belief that the Department of Health, Education & Welfare would have required a reshuffling of the faculty racial ratio at Joanna Elementary School." (12a) The trial court further found that the Superintendent "had never made any attempts whatsoever to transfer any other teachers at Joanna or at any of the other schools experiencing similar or worse [racial imbalance] problems than those thought to be occurring at Joanna." (10a).